

TESTIMONY OF CONSERVATION LAW FOUNDATION, INC.
BEFORE THE
SUBCOMMITTEE ON OCEANS AND FISHERIES
OF THE
SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Good morning, Senator Snowe, Senator Kerry, and other members of the Senate Subcommittee on Oceans and Fisheries. My name is Peter Shelley. I am a Vice President of the Conservation Law Foundation, a non-profit conservation advocacy organization based in New England. I am also the Director of CLF's Maine Advocacy Center in Rockland. I have worked on a variety of marine resource advocacy and policy issues for more than two decades. I am grateful for this opportunity to address the Subcommittee at this field hearing on the Magnuson-Stevens Act. Moreover, the United States Senate has played the major role in developing the national agenda for this Nation's important marine resources. I am honored to be able to speak directly to the Members and staff of the Subcommittee of the Senate where that agenda is fundamentally shaped.

Today's hearing inquires into two important topics: an evaluation of the implementation of the Sustainable Fisheries Act ("SFA") which is a retrospective exercise in nature, and the forthcoming reauthorization of the Magnuson-Stevens Act, which is prospective. While CLF is a Board member of the Marine Fish Conservation Network, this Subcommittee has already heard from the Network and received their detailed comments on these issues. I will not repeat those items except to indicate that a great deal of thought from a variety of conservation, fishery, and scientific perspectives has gone into the Network's suggestions and I urge the members of this Subcommittee to consider those comments thoroughly.

I will use today's opportunity to provide this Subcommittee with my own regional and personal perspective on the implementation of the SFA and the future key fishery policy issues that reauthorization should address.

Implementation of the Sustainable Fisheries Act:

The Sustainable Fisheries Act ("SFA") was the most important development in federal fisheries law since the enactment two decades earlier of the Magnuson-Stevens Act itself in the 1976. I believe that the driving force behind many of the major new provisions in the SFA was a general view held by commercial fishermen, recreational fishermen, marine scientists, and conservationists that the general condition of the oceans and the fisheries in the oceans was not markedly better in 1996 than it was in 1976. To the contrary, conditions in many of those fisheries had actually declined below 1976 levels despite two decades of active federal management.

While responsibility for these declines could be and was laid to a variety of hypothetical and real factors, there was a broad consensus from different perspectives that federal fisheries management was not working. The SFA was a

measured response by Congress that looked at a number of these factors, such as habitat losses and degradation, bycatch, discards, an indulgence of overfishing by Councils. Conceptually, the SFA amendments represented the beginning of an effort to shift fisheries management from a narrow species-by-species framework dominated by short-term economic interests to a broader ecosystem-based approach that protected the core factors in the ocean that were necessary to produce a healthy abundance and diversity of marine species for human harvest as well as other functions in the ocean system.

I believe that the SFA amendments were based on sound strategies that will improve our coastal and offshore marine resource systems and the social and economic conditions of people who depend on the health and availability of these resources. Because they are such a fundamental change from the business of fisheries management as practiced over the past two decades, it is too early to judge their full impact. The National Marine Fisheries Service ("NMFS"), working under significant time pressures with limited staffing and resources, took time to develop implementing regulations and guidance and the Councils, in their turn, had to integrate the new requirements of the SFA into an already crowded agenda.

That work has not been completed at this time. In New England, some of the SFA amendments have been implemented better than I had expected, and others have not fared as well. Like many problems in fisheries, it is tempting to point to some "special interest" or malevolent intent by one group or another as obstructing the intent of Congress but I do not believe that it is constructive to do so. Different people have interpreted Congressional intent in the SFA differently and it is not surprising to me that the full range of fishery policies identified in the SFA have not yet been fully implemented. The SFA is a work in progress and it would be a mistake to evaluate the benefits or flaws of the SFA amendments based on any one snapshot in time.

1. Essential Fish Habitat: The most significant new management issue that all Councils have had to address is the essential fish habitat requirements of the SFA and at least one lawsuit by conservation organizations and a fishing group from Cape Cod has been filed challenging the New England Fishery Management Council's and NMFS's actions implementing those provisions in the Multispecies Groundfish Fishery Management Plan in this region. The courts will resolve those legal and factual questions on their merits but I do not believe that either the existence or absence of litigation around implementing the SFA lawsuits provide evidence of legislative failure or excess.

The fishing community in New England is fully aware of the importance of the protection of essential fish habitat and realizes that there are impacts on those habitats from different fishing gear types. The basic thrust of the SFA to identify and protect particular habitats from destruction or negative alterations is sound and should be affirmed by Congress and implemented responsibly by all Councils and NMFS.

2. Institutional Reform: The SFA amendments as well as continued stock declines and economic losses in the New England region have forced positive changes in the institutions and processes by which fisheries are managed in New England. The New England Fisheries Management Council has responded to the increasing challenges of effective and responsible fisheries management by working hard to become a more effective and responsible organization. The committee structure assignments and leadership of the Council reflect a serious intent to restore and enhance fisheries in New England and to increase the professionalism and stature of Council operations.

The management actions by the Council have not yet been fully informed by many of these structural changes and the important broadening of perspectives in the Council appointments themselves, but we believe that we will see continued improvement in all areas. The New England Council of today is different in some very fundamental ways from the New England Council of ten years ago and we believe that regional fisheries and the regional marine resource will be the long-term beneficiaries of those positive institutional changes.

3. Bycatch: No one wants bycatch, that is, landings that must be thrown overboard because of economic or regulatory reasons. Some fishermen in this region are irresponsible and will tolerate the destruction of thousands of pounds of bycatch in order to land their full quota, but most deplore these practices. Some bycatch problems are regulatory problems, not legislative ones. The New England Council, for example, with NMFS's blessing put in place a thirty pound trip limit for some groundfish species while allowed continued fishing in those same areas for other species with non-selective gear this past year, resulting in the (anecdotal) bycatch and destruction of tons of economic and regulatory discards that will delay recovery of coastal cod stocks. When CLF's biologist went on a coastal dragger this past summer in some of these areas, the haulbacks were more filled with dead, previously discarded market size fish than they were with fresh catch. That is intolerable.

These management efforts were trying to respond to the economic impacts of area-wide closures to some fishing communities but we believe that they failed because they did not directly address the bycatch issue, assuming fishermen would move away from mixed stocks voluntarily. Most fishermen reported, however, that they couldn't get away from the cod no matter what they tried and as long as the grounds were open they had to fish. This is a lesson for the Council and NMFS to learn, but there is no reason for Congress to attempt to micro-manage or second-guess implementation. Congress needs to set strong performance standards for fisheries to eliminate these wasteful and unpopular bycatch problems and let the Councils and NMFS and the people in the region work through the measures and approaches to meet those standards.

There is a practical problem to the development of more selective gear and fishing practices that minimize bycatch, however, that Congress should review. Again, everyone agrees that it would be good to have more selective gear that reduce or

eliminate bycatch. The problem is designing and developing that gear. In other industries in this country, research and development of technological change is driven by competition, by self-funded and government funded programs for research and development through universities, by regulation, and by random entrepreneurial behavior and activities.

In fisheries, competition doesn't work to promote bycatch-reducing gear. Indeed, because competitive forces in fisheries have always shifted the fleet toward bigger and faster platforms and gears, such a paired-boat trawling techniques, producing more bycatch rather than less. In the current system, bycatch is simply an economic and ecological externality that bears no import to the costs of doing business for an individual boat. As a result, competition has perversely tended to worsen the bycatch and discard problem at all levels of the fleet, and has not produced incentives for gear selectivity improvement.

My point here is that competition will not produce improvements in gear selectivity unless there are direct economic costs borne by the boats associated with high bycatch rates. The costs of bycatch need to be internalized to the fleet so there is an incentive to reduce the practice. Perhaps the answer is prohibiting overboard discards, requiring all vessels to bring home everything they land in their gear for on-shore disposal with full accounting of this bycatch toward individual or quotas or reduced days at sea; perhaps there are other more creative answers. Our point here is that competition *per se* does not currently have incentives to promote gear research and development to reduce bycatch.

Similarly, there are few industry self-funded approaches that have emerged to do this critical research and development at universities or other similar institutions; nor are there significant government-funded research and development programs organized around this issue. Some Sea Grant programs work on fishing gear but it is not a system-level priority for Sea Grant that we can observe, at least in New England. Where these sorts of industry-led efforts have been tried, they have been moderately to highly successful, but funding is always the barrier. There is no reason, in our opinion, why the United States could not apply its considerable marine engineering talent to gear research and development focused on bycatch and habitat destruction and become a major exporter of gear technologies and expertise to the world's fisheries. Congress should evaluate what it could do to stimulate that prospect.

The regulatory incentives need to stay in Magnuson and, if anything, be strengthened. They are the only current "incentive" for Councils, commercial fleets, scientists, and government managers to address this problem and they are having some beneficial effects already, the Maine northern shrimp fishery being just one example.

The efficacy of these regulatory forcing mechanisms, however, is connected to the last, and perhaps best source of gear improvements in New England: the entrepreneurial spirit and ingenuity of the commercial fisherman in New England and

elsewhere. That resource has scarcely been tapped and for one reason. The current, highly restrictive quotas and days-at-sea management measures place severe, if not terminal consequences on the captain or boat owner who would like to experiment with gear modifications. Each day of experimentation comes right off the top of that boat's allocation, which is currently at or below the financial break point of many New England operations. More perversely, since future allocations of quota or days are often based on volume-based landings histories of the individual boats, people who innovate and land fewer fish than others are taking serious risks relating to their future in the industry.

These disincentives that preclude tapping the innovative capacity of members of the New England commercial fleet need to be removed so that research and development directed toward gear selectivity and habitat impact reductions does not require personal sacrifice or competitive disadvantage. Congress should look at what it could do to encourage the elimination of these disincentives.

SFA Summary: We believe that the SFA is an important and overdue step in the right direction for fisheries management in the United States. It can be improved and tightened and adjusted and better funded as suggested in the Marine Fish Conservation Network's comments, but the SFA fundamentally points in the right direction. What the SFA cannot force and what is critical in the short term in New England is greater and more proactive leadership on the directions of federal fisheries management from the several states.

Re-authorization of the Magnuson-Stevens Act

Looking forward and beyond the SFA mechanisms, Congress has some crucial strategic decisions before it that will shape the face of regional fisheries as well as bearing on the ability of the United States to be a competitive force in the world market of fish for years to come. Several of these choices that have particular bearing in New England come to mind:

1. We are at the end of an era of open access fisheries. What will the face of tomorrow's fisheries be in New England and how will those decisions be made?

Most current and reasonably foreseeable commercial fisheries are now closed to entry. Although these closures could conceivably be changed in the future, it is hard to image that improvements in harvesting capacity and technology will not allow the current fleet to more than keep up with any recoveries in fish populations. Indeed, most economists would conclude that there is significant over-capacity in New England for even the long-term foreseeable future. Economists say: "Let the market (and access to deep financial pockets) decide who stays and who goes. Bring on ITQ's or IFQ's or other market mechanisms to 'rationalize' the fleet." Some fishing operations and fleets in New England are already organizing themselves up to participate in this marketplace as a way of eliminating competitors as well as

improving their own business operations.

In New England, the traditional fleet has never been rational, so to speak, and many of us like that fact. Just as legitimate and rational social policies drove people to institutionalize the economic inefficiency of the “skip jack” oyster fleet in Chesapeake Bay, similar choices could be made up and down the coast of New England. Should the choice to the fishermen in Stonington, Maine be to either out-compete the factory trawler/processor fleet in “economic efficiency” for herring or be eliminated forever from access to the herring resource? Should access to capital determine whether or not the small boat fleet in Saco, Maine or a young woman from Cape Ann gets to try her skills as a commercial fisherman in the next century? Should a boat that hammered the resource over the past decade and built up an impressive “catch history” will be elevated by Congressional decree over ten boats that had more modest ambitions during that same time period or fished in several different fisheries? Should such fundamental economic, social, and cultural questions be decided as a matter of national policy using a one-size-fits-all approach, or should this matter that must be resolved ultimately at a more local level?

These questions are not resolved by the national standards in the Magnuson Act or anywhere else in the law, particularly the strategic decision of whether Congress wants to protect the traditional access of coastal communities to fishing as a priority over achieving full economic efficiency or even full “utilization” of all commercial species at all times. Congress has commissioned in the SFA several expert reports that touch on a number of these themes and Congressional deliberations on the recommendations in these several reports need to be thorough, public, and as fully informed about both the intended and the potential unintended consequences of any decisions Congress might make. Those strategic choices will have profound and irreversible impacts on the face and faces in New England’s fisheries forever.

2. The United States needs to develop a coherent, integrated national strategy for sustainable competition in the world market place for seafood and other marine resource related products and services.

With some notable exceptions, many parts of the United States and New England in particular have lost their market share in the world marketplace. Most of the fish that are eaten in New England and, indeed, most of the fish that are processed and distributed nationally from New England are imported into the region by air or truck, not by boat. Some of those fish come from other US fisheries, but many do not. When we look at the seafood products literature, we see that some of the new dominant fisheries are based in countries like Norway where serious fishery management has produced recoveries of fish populations and sustained them at levels that allow large volume buyers to reliably meet their quantity and quality demands. Volume buyers cannot depend on local sources of groundfish and flat fish in New England to meet their requirements. Volume buyers need healthy fish populations, maintained at high levels, harvested properly, and competent and competitive shore-side infrastructure.

Those requirements, in turn, can only be met with a national strategic commitment to US fisheries that requires at least one order of magnitude greater investment of time and resources than the US currently provides.

In analyzing Norway's success, for example, as a world power in fisheries, their competitive position is driven by a national and fully funded strategy to be a world power in fisheries: a commitment to fisheries management that does not tolerate overfishing of cod or any level of fishing mortality that approaches overfishing, an integrated and zoned aquaculture industry, a systematically designed and distributed system of research and development in industry and academia covering all aspects of being a world power from harvesting fish and protecting fishing habitats to processing and distribution to product development to marketing.

The differences between Norway and the US are quickly apparent by a visit to the annual Boston Seafood Fair, where the presence of the United States is virtually limited to a small booth properly extolling the virtues of seafood safety programs. Norway and other countries, on the other hand, broadly participate as countries in the Fair. Promotion of US fisheries is left to the individual efforts of US firms.

While this might seem like a strange issue for a conservation organization to be raising, we believe that our capacity to compete in increasingly global marketplace for seafood products and marine resource services is directly dependent on having a committed national strategy to restoring and protecting the marine resources and the marine resource base in our exclusive economic zone. No fish, no quality, no fishery. Commercial fisheries for cod were one of this nation's first and most profitable industries and New England was once a net exporter of salt cod to the world. Mismanagement and underfunding and the lack of an aggressive national strategy to protect the "golden cod" has changed all that for the worse.

We think the United States can gain market share in this area and should commit itself to doing so as rapidly as possible. Fisheries are an area where conservation common sense aligns directly with long term economic wealth and social well being. Before this alignment can happen, however, leadership must come from Congress in a way that Congress has never led our national fisheries effort before. In Washington on the Hill, fisheries need to shift from being predominantly a matter of constituency services to help with short-term crises, to being the focal point of increasing our competitive position in global (including our own domestic end-users) fish products industry.

3. Congress must begin the debate to design and implement a system to collect rents from marine resource harvesters and users.

Of all the publicly owned natural resources, only commercial and recreational fishing are "free." One could not go into a national forest and commercially log or even recreationally log without paying a fee; no one can graze on BLM land without paying

some kind of fee. No one can commercially drill in the oceans for oil without paying a fee. When other natural resources are exploited, the only serious policy question is whether the fee structures and levels are proper, not whether they should exist. And yet, fees in federal fisheries are limited to the costs of administrative expenses.

The collection of reasonable rents in return for the privilege of taking public resources and making personal profit from them is not fundamentally a philosophical or an ethical question, although it is certainly those as well. It is not about punishing fishermen and taking some right away from them that they have always enjoyed for free until now.

The collection of rents is essential to funding the basic and applied sciences that relate to fisheries success or failure, the research and development on better gears and habitat protection, the data collection (including the observers to provide some quality control and accuracy on data) and analysis, and the other activities that are pre-conditions to our collective ability to change from a management approach that is based on looking backward to one that is based on looking forward and has the intelligence to make dynamic and tactical shifts in management policies on a real time basis.

Until we can fund such a vision of fisheries management, we are doomed to repeat the incessant and steep ups-and-downs that have characterized too many US fisheries in recent decades. I believe Congress could go part of the way by spending significantly more general taxpayer dollars to allow agencies and Councils to do their jobs and fulfill their Congressional mandates responsibly. At the same time, the American taxpayer has a right and obligation to ask Congress why rents are not being extracted from the fisheries that profit, often generously, from the national investment in pollution control and other factors supporting our ocean's health. This is a contentious and difficult issue that no Congress would volunteer to tackle, but the plain truth is that it cannot be avoided and is long overdue.

4. The institutional architecture of federal fisheries management needs further work.

Most of our natural resource management programs are managed remotely by large bureaucracies of scientists, managers, and administrative staff who develop long term management plans for forests or grazing land or mineral development. While such designs are hardly perfect from a community perspective, the inherent stability and predictability of resource conditions under different management strategies is easy to analyze and confirm through inspection, and enforcement situations are difficult to hide for long.

In 1976, Congress recognized that marine resource management was another matter when it set up the Magnuson-Stevens Act and created the Council system, which functions essentially as a non-regulatory planning entity for NMFS to implement

federal fishery management policy. This was a very perceptive action on Congress's part as fisheries are very dynamic, are very different in different parts of the United States, and require local knowledge. We think this was a good approach, even though we haven't always approved of the actions or "non-actions" taken by the New England Council.

There are a series of issues that Congress needs to consider in any re-authorization of the Magnuson-Stevens Act, given the lessons of twenty years of Council activity and from our perspective on the New England Council. First, the integrity and inclusiveness of a broad set of interests on the Council itself needs to be re-analyzed. Councils make decisions that affect broad segments of the region's inhabitants. Are the Councils and the qualifying requirements for Council appointees appropriate in insure that these interests are represented on the Councils and reflected in the Council's decisions? Is Congress satisfied with the conflict-of-interest rules that are currently in place? The legitimacy and moral force of the Council's actions is a direct function of the integrity and legitimacy of the Council itself.

Second, for the same basic reason that Congress developed the Council system in the first place, we think that the Council structure and management process in New England may be occurring at too large a scale. Most of the region's fishermen – who are ultimately the principle implementing forces of Council planning and management – are unable to participate meaningfully in the process and, as a result, do not always either understand the background or justification for a particular action or are faced with a rule that will not accomplish its intended conservation or management purpose in their area because of local conditions. Participation in the Council and NMFS process is also a function of how close you live to the Council and whether you are an active, full time, sea-going fishermen or a shore-side owner or industry representative.

The lack of more meaningful democratic elements and practices in fisheries management may play a larger role in whether a particular management strategy succeeds or fails than some people believe. In Garrett Hardin's 1968 article "Tragedy of the Commons" that provided so much insight into the nature of the underlying causes of the ruination of public resources, he indicated that the tragedy could only be prevented by "mutual coercion, mutually agreed upon." He argued that such a system would never be perfectly just but that a good enough justness was generally sufficient. In New England, Council decisions are hardly mutually agreed upon.

On the other hand, there are strong national interests in federal fisheries that cannot be delegated lightly to local, decision-making processes. The question of whether and how to strike a better balance between more local institutional management activities and efficient but perhaps unwieldy and non-representative Councils with jurisdiction over vast expanses on the eastern seaboard, for example, is a challenging one for Congress. There is a growing body of exciting theory extolling the value and virtues of different forms of "bottom-up", "co-management," "community-based" management working in concert with more federally-oriented "top-down" approaches, but the theory

is quite a distance away from the reality of the present institutional and operational capacity to implement other models.

We believe strongly that these new approaches merit serious attention and are already implied by the National Standard 8 in the SFA. We urge members of the Subcommittee to give these ideas serious thought and provide on a regional, pilot basis the option of further experimentation and development of the practice of such fishery management partnerships.

5. Congress should mandate greater cooperation and coordination with Canadian scientists and managers in fisheries management of shared species.

As the herring assessment process in the Gulf of Maine illustrated, there are significant differences between the ways that Canadian scientists and managers approach their fisheries responsibilities and the way their counterparts in the US do. Without suggesting either government's approach is inherently superior, it is important that there be complementary approaches in the data collection, stock assessment, and management of fish stocks that move between Canadian and US waters.

Summary on Re-Authorization Issues: We believe that there are some fundamental and far-reaching strategic issues that Congress must tackle in the near future, notwithstanding the SFA amendments in 1996 and any improvements to those provisions that Congress enacts in this next session. They will involve vision; they will require significant private and public investments; and they will involve choices that will inevitably produce winners and losers since not all national standards can be optimized simultaneously. But they must be made and the United States Senate is the best body to begin to forge consensus on these matters.

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Senator Snowe, thank you again for this opportunity to testify before your committee and for holding hearings in Maine. I again urge the Subcommittee to carefully consider the MFCN's agenda and our goals. They are goals that are shared by most people in New England. The strategies for reaching these goals are the result of considerable discussion and will certainly require further debate in Congress and outside Congress. But the goals are fundamentally sound and will produce stronger New England fisheries.

There are also many smaller initiatives under way in the region today that would have been unthinkable ten years ago and they are the product of thousands of hours of often volunteer work and cooperation. The Port of Portland is working on a strategic plan for the future of the fishing industry in Portland; the Stonington Fishermen's Alliance is gearing up to restock scallops in their waters to rebuild that fishery; and the Tri-State Alliance demonstrated for the first time that Maine, New Hampshire, and Massachusetts could reach political consensus on a funding program even where

